83-63

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether it is a violation of § 8(b)(1)(B) of the National Labor Relations Act for a union to discipline a member, who is also a supervisor, where:

(a) The union does not represent the employer's employees and does not display a representational interest in the employees.

(b) The discipline was imposed because the union member performed an employer function, contrary to union rules, by using his master electrician's license to obtain required governmental permits.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

International Brotherhood of Electrical Workers, Local Union No. 323, AFL-CIO, respectfully prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Eleventh Circuit entered April 18, 1983.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 255 NLRB No. 182 and is printed in the appendix at pages 37a-42a. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 703 F.2d 501 (11th Cir. 1983) and is reproduced in the appendix at pages 1a-14a.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 18, 1983. The jurisdiction of this court is pursuant to 28 USC § 1254(1).

FEDERAL STATUTE INVOLVED

This case involves § 8(b)(1)(B) of the National Labor Relations Act, 29 USC § 158(b)(1)(B).

> "Section (b). It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances. . . ."

STATEMENT OF THE CASE

This court is asked to review a judgment of the Court of Appeals for the Eleventh Circuit enforcing an order of the NLRB.[1] The order held that Local No. 323 of the IBEW had committed an unfair labor practice in violation of § 8(b)(1)(B) of the NLRA by disciplining and expelling a member who performed supervisory functions for his employer.

The charge alleged that the Union had unlawfully disciplined the member, John Willey, because he was working for a non-Union electrical contractor and because he used his master electrician's certificate to obtain county permits required by his employer in order that it might engage in its contracting business.

The Board adopted the administrative law judges' ruling that disciplining a supervisor member because he works for a non-Union employer violates § 8(b)(1)(B),

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[1] The Court of Appeals had jurisdiction under § 10(e) of the National Labor Relations Act, 29 USC §§ 151, 160(e).

citing the Board's previous holding in *New Mexico Council of Carpenters (A. S. Horner, Inc.)*, 177 NLRB 500 (1969) enforced, 454 F.2d 1116 (10th Cir. 1972).

The Board majority also rejected Chairman Fanning's argument in dissent, that discipline imposed on Willey because he was using his master's license to obtain electrical permits for his employer did not come within the reach of § 8(b)(1)(B).

On appeal, the 11th Circuit rejected the Union's reliance on the 9th Circuit's opinion in *NLRB* v. *International Brotherhood of Electrical Workers, Local 73* (Chewelah Contractor's, Inc.), 621 F.2d 1035 (9th Cir. 1980). The 11th Circuit declined to adopt the holding in *Chewelah* that a Union does not act contrary to § 8(b)(1)(B) if it neither represents nor displays a representational interest in the company's employees.

The court also rejected the argument that the use of Willey's license to "pull" permits went beyond his duties as a supervisor and was in reality, so intimate and necessary an element of the business that it was the functional equivalent of an ownership interest.

BACKGROUND

John Willey was a long-time member of the IBEW. Prior to migrating to Florida in 1970, he had been a member of Local 725 in Terre Haute, Indiana. After his arrival in Florida, he obtained a work permit from Local 323 and obtained employment through its hiring hall.

In late 1975 Willey was employed by Drexel Properties, Inc., a non-Union employer, as its electrical superintendent. As such, he performs supervisory activities within the meaning of the statute. He does not own shares in the business and receives a salary for his work.

MASTER'S CERTIFICATE

Willey is certified as a master electrician. This certification qualifies him to operate as an electrical contractor. By reason of this qualification he can obtain electrical work permits for Drexel. These permits are a prerequisite to Drexel being able to legally perform electrical contracting work.

Willey regularly "pulls" permits for Drexel. In so doing, he accepts legal responsibility for the performance of the electrical work covered by the permit.

CHARGES

Beginning on September 16, 1977, Willey was twice charged with violations of the IBEW Constitution[2] and the working agreement between Local 323 and area Union employers.[3] The violations alleged were that he worked for a non-Union contractor and that he used his

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[2] The Constitutional provisions were Art. XXVII, § 1, subsections 10 and 21:

ARTICLE XXVII
MISCONDUCT, OFFENSES AND PENALTIES

sec. 1. Any member may be penalized for committing any one or more of the following offenses:

(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the IBEW.

(21) Working for any individual or company declared in difficulty with a L. U. or the IBEW, in accordance with this Constitution.

[3] The pertinent provision of the area working agreement reads,

ARTICLE II
EMPLOYER RIGHTS—UNION RIGHTS

Section 2.01. No member of the International Brotherhood of Electrical Workers, or other employees, subject to employment by employers operating under this agreement, shall himself become an employer for the performance of any electrical work.

master's license to obtain permits for his employer. Willey was fined on both occasions and ultimately expelled from the Union.

REASONS FOR GRANTING THE WRIT

I

The Court Of Appeals Extended The Reach Of § 8(b)(1)(B) Of The NLRA Beyond Its Permissible Boundary When It Ruled That The Union Violated That Section By Disciplining A Supervisor Member Where:

(a) The Union Did Not Represent The Employer's Employees And Did Not Display A Representational Interest In The Employees.

(b) The Discipline Was Imposed Because The Union Member Performed An Employer Function, Contrary To Union Rules, By Using His Master Electrician's License To Obtain Required Governmental Permits.

A. Previous Decisions Construing § 8(b)(1)(B)

This court, on two occasions, has explored the outer limits of § 8(b)(1)(B) of the NLRA. In *Florida Power and Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974) the court held that the section was not violated when a Union disciplined member supervisors for crossing Union picket lines to perform work that would otherwise have been performed by striking non-supervisory employees.

The court came to the opposite conclusion in *American Broadcasting Companies, Inc.* v. *Writer's Guild of*

Any member, or other employee, possessing a masters license while employed under the terms of this agreement, shall maintain same on an inactive status. Any employer working under this agreement shall not take out a permit or master a job for any other person or firm, except in the case of a true joint venture.

America, West, Inc., 437 U.S. 411, 98 S.Ct. 2423, 57 L.Ed.2d 313 (1978). *American Broadcasting* held that the provision was violated where supervisor members crossed picket lines to perform their normal supervisory duties.

Both of these cases focused on the question of whether the discipline ". . . adversely affected the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804, 805, 437 U.S. at 424. The result turned on the nature of the activity that provoked the discipline.

This court found a violation where the activity was connected to the member's supervisory duties and held that no violation had occurred where the suspect activity was unconnected to those duties.

B. The Present Case Raises Questions Regarding The Remoteness Of The Union From The Employer And The Nature Of The Suspect Activity That Are Not Answered By This Court's Previous Decisions.

1. The union was too remote from the employer for its disciplinary actions to transgress § 8(b)(1)(B).

Florida Power and Light, supra, and *American Broadcasting, supra*, both involved unions that represented the company's employees and discipline that arose out of activities occurring during an economic strike. Neither of these elements exist in the present case. Local 323 does not represent Drexel's employees and the Board did not make a finding that the Union displayed a representational interest in the company's employees.

The 9th Circuit in *NLRB* v. *International Brotherhood of Electrical Workers, Local Union No. 73*, (Chewelah Contractor's Inc.), 621 F.2d 1035 (1980) held that under

such circumstances a violation did not occur. In *Chewelah*, the union member had been disciplined because he violated a Union by-law prohibiting members from obtaining employment with non-Union employers.

The rationale for the 9th Circuit's *Chewelah* decision was the remoteness of the Union from the employer. Obviously, there must be some point at which the relationship between the Union's activity and the employer becomes so remote that there is no nexus between the discipline and the underlying policy supporting § 8(b)(1)(B).

The section was enacted to prevent unions from restraining or coercing employers in the selection of their representatives for the purposes of collective bargaining or the adjustment of grievances. While it is recognized that indirect, as well as direct, coercion is prohibited, *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB 2173, the statute cannot be construed to prevent all discipline of union members who happen, also, to be supervisors.

If the opposite rule was to prevail, then a union would commit an unfair labor practice if it expelled a supervisor member who, under orders from his employer, refused to pay dues. The expulsion would face the employee with the choice of losing accumulated union benefits or finding a more sympathetic employer. If he chose to abandon his present employment, rather than lose his benefits, it could be said that the union's action had the effect of restraining the employer's choice of his representative. Nevertheless, it would be preposterous to argue that a union is prohibited by § 8(b)(1)(B) from enforcing a uniform dues policy as to all of its members.

The 9th Circuit recognized this when it held that a uniform policy against non-Union employment could be

enforced because the connection to the employer was too remote. The 11th Circuit, in this case, rejected the 9th Circuit's approach and simplisticly held that any act having ". . . the effect of restraining the employer's choice . . ." of his supervisor violates the Act, 703 F.2d at 506.

It is submitted that the "any effect" test goes far beyond this court's previous holdings and potentially subjects unions to adverse action by the Board for numerous acts relating to their internal management, simply because those acts impact upon members who also happen to be supervisors.

The direct and express conflict between the decision in this case and the decision in *Chewehela* should be resolved by this court because of the potential impact upon unions of the "any effect" test. The uncertainty that this test engenders will have a chilling effect upon unions and will inhibit them from engaging in otherwise permissible activities for fear that a remote employer, with whom they have no contact, might file an unfair labor practice charge. This court should resolve that uncertainty.

2. A union member who uses his license to obtain essential permits engages in an entreprenuerial activity and should properly be treated as the functional equivalent of an owner for purposes of § 8(b)(1)(B).

The Board has consistently held § 8(b)(1)(B) inapplicable in cases where the member is the owner of the business. See, Glaziers and Glassworkers, Local 1621, 211 NLRB 509 (1975). The Union argued in the Court of Appeals that Willey's use of his masters license to obtain required permits for Drexel was not a supervisory function. Instead, it was an ownership function which, for § 8(b)(1)(B) purposes, made Willey the equivalent of an owner.

The 11th Circuit rejected this argument on the basis that the Union confused ownership with management duties. It said that supervisors are managerial agents for the employer and perform numerous tasks closely associated with the employer's role. The court further stated that the reason the owner of a business is not covered by the statute is that he has a personal stake in the business and thus, would not be influenced in the performance of his grievance-adjustment or collective bargaining function because, any decision he makes, directly works to his benefit or detriment depending upon how he decides it, 703 F.2d at 507.

This begs the question. The employer is the adversary in the context of labor relations. Organizations that represent workers have good reason to prohibit employer membership. It is usually wise to keep the camel's nose out of the tent lest he wriggle his way inside, altogether.

There is a rational basis, especially in the construction industry, for distinguishing between supervisors and owners. Members in the construction industry often move back and forth between rank and file and supervisory jobs. Provisions are therefore made to permit supervisors to retain some form of union membership, see *Florida Power and Light*, *supra*, n.6, 417 U.S. at 796.

A union has an interest in keeping its supevisor members because many of them can reasonably be expected to return to rank and file status. This interest does not necessarily carry over to the much smaller group who become employers. The adversary nature of the labor-employer relationship may reasonably prevail over the union's desire to retain its membership.

The Court of Appeals correctly noted that ". . . mere labels do not control the existence or absence of a viola-

tion." 703 F.2d at 506-507, n.10. It failed to apply this rule to the question of who is the employer. The Union contends that if an employee performs a function that is so uniquely necessary to the functioning of the enterprise that without it the enterprise cannot function, then, the employee should be deemed the functional equivalent of an owner.

An example might illuminate this issue. Suppose that a union member put up the capital for a business and operated the business as its chief manager. At the same time, he put all of the stock in the name of his spouse and the spouse took no part in the operation of the business. Under these circumstances, would a court look beyond labels and find that the member was the "functional" equivalent of the employer.

If the answer is conceivably yes, then the Court of Appeals' rejection of the Union's functional argument should be re-examined. The Union contends that Willey's masters license is the functional equivalent of capital in the electrical contracting business. When he used his license to "pull" permits, his contribution was the functional equivalent of supplying capital. The fact that he did not gain an ownership interest is irrelevant. What is important is that he so closely allied himself with the employer, that he moved beyond mere management and for purposes of the license, became part of the employer. Because of the widespread use of employee permits in the construction industry, this court should examine the issue with a view toward defining the tests necessary to distinguish between a union's legitimate interest in excluding employers from membership and improper coercion of supervisory personnel.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the ____ day of ____, 1983, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit were served on Counsel for the Respondent by depositing the same in the United States mail with first class postage prepaid and addressed to: Elliott Moore, Deputy Associate General Counsel, National Labor Relations Board, 1717 Pennsylvania Avenue, S.W., Washington, D.C. 20570.

Joseph C. Segor

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APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

No. 81-6108

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BOARD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323,
Respondent.

April 18, 1982

National Labor Relations Board petitioned for enforcement of order directed against labor union for alleged unfair labor practice in disciplining and expelling a member. The Court of Appeals, Albert J. Henderson, Circuit Judge, held that it was an unfair labor practice to discipline member who was electrical superintendent for land developer, notwithstanding that union did not represent developer's employees or that member used his master's license to obtain electrical permits.

Enforcement ordered.

Application for Enforcement of An Order of the National Labor Relations Board.

Before HENDERSON and HATCHETT, Circuit Judges, and TUTTLE, Senior Circuit Judge.

ALBERT J. HENDERSON, Circuit Judge:

The National Labor Relations Board (Board) petitions this court to enforce an order directed against the respondent, Local Union 323 of the International Brotherhood of Electrical Workers (Union), for an alleged unfair labor practice in viola-

tion of § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). We enforce the order.

The facts are essentially undisputed. In 1970, John Willey, a longtime member of the International Brotherhood of Electrical Workers (IBEW), moved to Palm Beach County, Florida. He obtained a work permit from the local IBEW chapter, Local 323, and secured an electrician's job through the Union's hiring hall. He retained his official membership with his former local chapter of the IBEW in Terre Haute, Indiana.

In 1974, Willey passed the county's master electrician examination and received a certificate of competency. This authorization enabled him either to operate as a contractor or to apply for the required electrical permits on behalf of other contractors. Soon after acquiring master electrician status, Willey and a partner formed their own electrical contracting business. At that time, he allowed his working permit with the local Union to expire, although he continued to pay membership dues.

The following year, Willey sold his business and accepted a position as the electrical superintendent for Drexel Properties, Inc. (Drexel). Drexel is engaged in land deveopment and residential and warehouse construction. The company is a nonunion employer and has no contract with Local 323. In his capacity as superintendent, Willey supervised all of the electrical contracts performed in the company's construction projects. His responsibilities include the hiring and firing of electricians, handling employee complaints concerning working conditions and equipment safety, imposing disciplinary sanctions, making work assignments, and approving vacation requests. Additionally, he utilizes his master's certificate to obtain county permits on behalf of Drexel. By law, he is required to accept supervisory responsibility for all electrical work performed pursuant to those permits. As compensation, Willey receives a salary; he does not share in Drexel's profits nor does he hold any ownership interest in the company.

In 1977, the business manager of Local 323 preferred written charges against Willey, accusing him of "running a nonunion electrical contracting business." He charged that Willey had violated the IBEW Constitution.[1] During the ensuing trial, Willey and the Union officials discussed the fact that he secured electrical work permits for Drexel through the use of his master's certificate. The trial board informed him that this practice violated the working agreement between Local 323 and area union employees.[2] One member advised Willey to quit his job and leave the area.[3] Soon afterward, Willey was found

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[1] The constitutional provisions cited in the charge were Article XXVII, § 1, subsections 10 and 21:

ARTICLE XXVII
MISCONDUCT, OFFENSES AND PENALTIES

sec. 1. Any member may be penalized for committing any one or more of the following offenses:

(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W.

(21) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W., in accordance with this Constitution.

[2] The pertinent provision of the area working agreement reads,

ARTICLE II
EMPLOYER RIGHTS—UNION RIGHTS

Section 2.01. No member of the International Brotherhood of Electrical Workers, or other employees, subject to employment by employers operating under this agreement, shall himself become an employer for the performance of any electrical work. Any member, or other employee, possessing a masters license while employed under the terms of this agreement, shall maintain same on an inactive status. Any employer working under this agreement shall not take out a permit or master a job for any other person or firm, except in the case of a true joint venture.

[3] During the subsequent hearing before an Administrative Law Judge (ALJ), the officer denied having ever made that remark. The ALJ, however, credited Willey's account of the conversation. We may not disturb a finding based upon a credibility determination. *See NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978).

guilty of violating the two constitutional provisions and was fined $1,000.00 for each infraction. In a letter to Willey, the tribunal agreed to suspend part of the fine if he would "get right with the Local Union within 30 days and commit no further violations for a period of one year."

Willey then appealed to an International Vice President of the Union. That official affirmed the trial board's decision and noted that Willey had not contested the fact that he was "employed by a firm who does not have an agreement with Local 323." He also pledged to reduce the fines, contingent upon Willey's "immediate cessation of the violation." Subsequently, Willey continued to pursue his appeal in correspondence to various IBEW officers.

Before the Union ever informed Willey that he had exhausted his appeals, another member of Local 323 filed new accusations against him citing the same two constitutional provisions as the earlier charge, and also claiming a violation of the area working agreement. Willey was adjudged guilty of all three violations and fined an additional $5,150.00. The union offered to suspend the second set of fines if Willey would pay the fine outstanding on the first charge. Insisting that he was still appealing the original decision and that he intended to appeal the second set of charges, he refused. Consequently, the trial board expelled Willey from membership in the IBEW.

As a result of these actions, the Union was charged with an unfair labor practice, i.e., a violation of § 8(b)(1)(B), which proscribes the restraint or coercion of an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. After a hearing, the Administrative Law Judge (ALJ) found that the 1977 fines were imposed for "working for a nonunion contractor." The ALJ also concluded that the second set of violations concerned his association with a nonunion employer and his use of his master's certificate for the benefit of Drexel. In his view, these sanctions constituted unlawful coercion under § 8(b)(1)(B). The ALJ rejected the Union's contention that the statute did

not apply to its conduct because Willey was an employer. Based on these findings, the ALJ recommended a cease and desist order enjoining further violations, as well as various types of affirmative relief.

The Union filed exceptions to the ALJ's findings. On review, the National Labor Relations Board adopted all of the ALJ's pertinent findings and conclusions of law. The Board members unanimously agreed that the union acted in violation of § 8(b)(1)(B) by disciplining Willey for his employment with a nonunion firm. A majority of the Board also characterized the fine imposed for using the master's certificate as "part and parcel of the same violation." One member, however, expressed a contrary view. The Board now seeks to enforce its order.

Section 8(b) provides in pertinent part that "[i]t shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . .(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Since the 1968 decision in *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB 2173, the Board—with judicial acquiescence—has construed the statute to prohibit not only direct pressure on an employer, but also coercion aimed at the supervisor, which indirectly affects the employer's selection. *See American Broadcasting Cos.* v. *Writer's Guild of America, West, Inc.*, 437 U.S. 411, 429, 98 S.Ct. 2423, 2433-34, 57 L.Ed.2d 313, 328 (1978); *see generally Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, 800-01, 94 S.Ct. 2737, 2742-43, 41 L.Ed.2d 477, 485-86 (1974). In spite of this expansive interpretation, the reach of § 8(b)(1)(B) is not without restriction. In two cases decided during this past decade, the Supreme Court examined the "outer limits" of the statute's application. *See, e.g., Florida Power & Light*, 417 U.S. at 805, 94 S.Ct. at 2745, 41 L.Ed.2d at 488. A closer look at the provision's "outer limits" will demonstrate that the Union's actions in this case fall within those parameters, thereby constituting prohibited conduct.

The Court in *Florida Power & Light* faced the issue whether punitive measures taken by a union against supervisory personnel for crossing picket lines to perform duties customarily undertaken by rank-and-file employees contravened § 8(b)(1)(B). Without repudiating the *San Francisco-Oakland Mailers'* doctrine, the Court refused to extend the statute to immunize a supervisor's performance of rank-and-file work. *Id.* at 805, 94 S.Ct. at 2745, 41 L.Ed.2d at 488. According to the Court, it was the purpose of Congress to protect an employer's "*selection* of its representatives for the purposes of collective bargaining and grievance adjustment." *Id.* at 804, 94 S.Ct. at 2744, 41 L.Ed.2d at 488 (emphasis in original). For that reason, the Court said,

> [t]he conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

Id. at 804-05, 94 S.Ct. at 2744-45, 41 L.Ed.2d at 488. Finding that the union discipline did not affect the supervisors' performance of the pertinent duties, the Court held that the Union's conduct did not violate the statute. *Id.* at 805, 94 S.Ct. at 2745, 41 L.Ed.2d at 488.

In *American Broacasting Cos.*, the Court had occasion to consider the implications of its holding in *Florida Power & Light*. The union involved in that case ordered its supervisory members not to cross picket lines, even to perform their supervisory duties. Some of the members obeyed the directive, and the ones who did not were subsequently penalized by the union. In its evaluation of the legality of the union's actions, the Court reiterated the inquiry originally formualted in *Florida Power & Light*. Union discipline of a supervisor contravenes § 8(b)(1)(B) if that coercion "may adversely affect" his performance of grievance adjustment or collective bargaining responsibilities. *American Broadcasting Cos.*, 437 U.S. at 429, 98 S.Ct. at 2434, 57 L.Ed.2d at 328; *see Florida Power &*

Light, 417 U.S. at 804-05, 94 S.Ct. at 2744-45, 41 L.Ed.2d at 488. Applying that test to the facts before it, the Court concluded that the requisite "adverse" effect was present. As for the supervisors kept from work by union pressure, the opinion stated that the "employer was restrained and coerced within the meaning of § 8(b)(1)(B) by being totally deprived of the opportunity to choose these particular supervisors as his collective-bargaining or grievance-adjustment representatives during the strike." *American Broadcasting Cos.*, 437 U.S. at 432, 98 S.Ct. at 2435, 57 L.Ed.2d at 329. Similarly, the Court agreed with the Board that the discipline imposed on those members who actually crossed the picket lines could influence the performance of their grievance-adjustment duties and therefore deprive the employer of "the full range of services from his supervisors." *Id.* at 434, 98 S.Ct. at 2436, 57 L.Ed.2d at 331. The Court reasoned that "[u]nion pressure on supervisors can affect either their willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of representative." *Id.* at 436, 98 S.Ct. at 2437, 57 L.Ed.2d at 332; *see also NLRB* v. *System Council T-6, International Brotherhood of Electrical Workers*, 599 F.2d 5, 9 (1st Cir. 1979).

To illustrate, the Court cited with approval *New Mexico District Council of Carpenters and Joiners of America (A.S. Horner, Inc.)*, 177 NLRB 500 (1969), *enforced*, 454 F.2d 1116 (10th Cir.1972), a decision particularly applicable to the case at hand. *See American Broadcasting Cos.*, 437 U.S. at 436 n.36, 98 S.Ct. at 2437 n.36, 57 L.Ed.2d at 332 n. 36. In *A. S. Horner*, the Board found, as it did in this case, that union discipline of a member because he worked as a supervisor for a nonunion employer violated the statute. 177 NLRB at 503; *c.f. Wisconsin River Valley District Council* v. *NLRB (Skippy Enterprises, Inc.)*, 532 F.2d 47 (1976) (statute prohibits union fining member-supervisor for disobeying a "no contract-no work" policy and working for employer who refuses to sign bargaining agreement). In discussing *A. S. Horner*, the Court relied upon the District of Columbia Circuit's analysis of that case in

International Brotherhood of Electrical Workers v. *NLRB*, 487 F.2d 1143, 1154-55 n. 19 (D.C.Cir.1973) (en banc), *aff'd sub nom.*, *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers*, 417 U.S. 790, 94 S.Ct. 2737, 41 L.Ed.2d 477 (1974). In that opinion, the court observed that *A. S. Horner* "falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing." 487 F.2d at 1155 n.19.

Against this background, the Union's disciplinary sanctions and eventual expulsion of Willey constitute unlawful coercion. The ALJ found, based on uncontroverted testimony, that Willey had extensive grievance adjustment responsibilities in his capacity as Drexel's electrical superintendent. As previously noted, Willey had numerous duties—such as handling complaints of conditions and safety at the work site—requiring settlement of the individual problems of the employees under his supervision. Because he was fined for his affiliation with a nonunion company, "compliance . . . with the union's demands would have 'the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances.' " *American Broadcasting Cos.*, 437 U.S. at 436 n. 36, 98 S.Ct. at 2437 n. 36, 57 L.Ed.2d at 332 n. 36, *quoting*, *A. S. Horner*, 177 NLRB at 502. Such a potential adverse effect on the employer's choice is determinative under the Supreme Court's test. *See, e.g.*, *American Broadcasting Cos.*, 437 U.S. at 429, 98 S.Ct. at 2434, 57 L.Ed.2d at 328. Thus, the union's sanctions against Willey amounted to an unfair labor practice in violation of § 8(b)(1)(B).

Nevertheless, the Union advances several reasons why the prohibition should not apply to its actions in this case. First, it argues that, because it did not represent Drexel's employees, the sanctions against Willey were an internal union matter, and not an attempt to coerce his employer. As support for this position, it relies on *NLRB* v. *International Brotherhood of Electrical Workers, Local 73 (Chewelah Contractor's, Inc.)*, 621 F.2d 1035 (9th Cir.1980).

In *Chewlah*, the court held that a union does not act contrary to § 8(b)(1)(B) if it neither represents nor displays a representational interest in the company's employees. 621 F.2d at 1037. The union in *Chewelah* had fined a member-supervisor for his employment with a nonunion company. The Board declared the discipline unlawful under § 8(b)(1)(B). On appeal, the Ninth Circuit refused to enforce the order. The court initially identified the two concerns it considered paramount in Congress' enactment of the statute: (1) preventing union pressure on employers regarding their participation in multiemployer bargaining units, and (2) guaranteeing a bargaining representative's complete loyalty to his employer.[4] *Id.* at 1036. While the court admitted that such considerations may be relevant when the union represents the company's employees, absent that nexus, the policies underlying the statute were not implicated. *Id.* at 1036-37.

The court further observed that in all the § 8(b)(10(B) decisions it had reviewed, the union had been the bargaining representative of the company's employees.[5] *Id.* at 1037. Because it did not have such a representational interest, the union lacked any "*incentive* to either influence Chewelah's choice of

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[4] We note, however, that the Supreme Court has rejected the notion that Congress intended § 8(b)(1)(B) to guarantee a supervisor's loyalty. *See Florida Power & Light*, 417 U.S. at 813, 94 S.Ct. at 2749, 41 L.Ed.2d at 492-93. Rather, other provisions in the Act address that concern. *Id.* at 807, 94 S.Ct. at 2746, 41 L.Ed.2d at 489.

[5] The court did not mention *A. S. Horner*, or the Supreme Court's tacit approval of that case in *American Broadcasting Cos.* In *A. S. Horner*, the union had lost two representation elections and did not represent the company's employees at the time of the imposition of the sanctions. 454 F.2d at 1117; *cf. International Organization of Masters, Mates and Pilots, Marine Division* v. *NLRB*, 539 F.2d 554-556 (5th Cir. 1976) *cert. denied*, 434 U.S. 828, 98 S.Ct. 106, 54 L.Ed.2d 87 (1977) (union prohibited from picketing employer who had entered collective bargaining agreement with rival union instead of hiring its members as supervisors).

bargaining representatives or affect [the supervisor's] loyalty to Chewelah." *Id.* (emphasis added). Finally, characterizing the discipline as an internal union affair, the court emphasized that the penalized member always retained the option of resigning from the union.[6] *Id.* For these reasons, the court announced that "[a] union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer, if the union neither represents nor shows an intent to represent the employer's employees."[7] *Id.*

In this case, the Union invites us to engraft the same limitation on our interpretation of the statute.[8] We decline to do so. Our reading of the statute, and the two Supreme Court deci-

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[6] On the contrary, the Supreme Court has suggested that the option of terminating one's union membership does not alleviate the unlawful coerciveness of a union's sanctions. *American Broadcasting Cos.*, 437 U.S. at 437, 98 S.Ct. at 2437-38, 57 L.Ed.2d at 332. Moreover, we are unconvinced that discipline imposed in those circumstances is aimed solely at a conflict between the union and its member. As the Board observed in *A. S. Horner*, "the basic dispute underlying the disciplinary action aginst [the supervisor] was not entirely an intra-union matter but stemmed from the fact that the Company did not have a collective-bargaining agreement with the [union]." 177 NLRB at 503. In effect, the union is "using its internal working rules to boycott an employer who [does] not have a contract with the [union] by making it a violation, subject to fine, for its members to work for such an employer." *Id.* at 502.

[7] Testimony at the hearing suggested that Local 323 may indeed have had an interest in representing Drexel's employees. Hearing Transcript at 44, 194, 403-05, 422. If so, the union's assessment of a penalty against Willey violated the statute even under the test posited by the Ninth Circuit. The ALJ and the Board, however, made no finding on the issue.

[8] The Board claims that the Union has foreclosed our consideration of this argument because it did not raise the defense during the administrative proceedings. *See* 29 U.S.C. § 160(e). To the contrary,

sions construing it, does not support such a restrictive application. Most significantly, contrary to the *Chewelah* court's suggestion, a § 8(b)(1)(B) violation does not hinge on the union's incentive or intent in disciplining a supervisory member. Rather, the statute proscribes any union pressure which "may adversely affect" the supervisor's performance of the protected duties. *American Broadcasting Cos.*, 437 U.S. at 429, 98 S.Ct. at 2434, 57 L.Ed.2d at 328; *Florida Light & Power*, 417 U.S. at 804-05, 94 S.Ct. at 2744-45, 41 L.Ed.2d at 488. Hence, the provision prohibits any union conduct which has the effect of restraining the employer's choice, even if the union's motivation does not contemplate that result.[9]

Placing the emphasis on the effect caused by the union's actions, rather than its intent, is more consistent with the fundamental purpose of the statute. Congress' overriding concern in enacting § 8(b)(1)(B) was to insulate an employer's *selection* of his collective bargaining or grievance adjustment

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the Union preserved the contention in its exceptions to the ALJ's decision, which were submitted three months prior to the Ninth Circuit's issuance of the *Chewelah* opinion. There, the Union emphasized that it did not represent Drexel's employees, thereby rendering the sanction an internal union matter outside the scope of § 8(b)(1)(B).

[9] In *American Broadcasting Cos.*, Justice Stewart in dissent underscored this implication of the majority's holding. As he observed,

> [i]n the present cases it is entirely clear that the union had no interest in restraining or coercing the employers in the *selection* of their bargaining or grievance adjustment representatives, or in affecting the *manner* in which supervisory employees performed those functions. As the Court notes, . . . the union expressed no interest at the disciplinary trials in the kind of work that was done behind its picket lines. Its sole purpose was to enforce the traditional kinds of rules that every union relies on to maintain its organization and solidarity in the face of the potential hardship of a strike.

437 U.S. at 440, 98 S.Ct. at 2439, 57 L.Ed.2d at 334 (citations omitted) (emphasis in original).

representative from union influence or interference. *See, e.g., Florida Power & Light*, 417 U.S. at 803, 94 S.Ct. at 2744, 41 L.Ed.2d at 487. An attempt to force a member-supervisor to cease working for a nonunion company demonstrably infringes on the employer's right to choose that person as its representative. *See A. S. Horner*, 177 NLRB at 502. In view of that inevitable result, even a union endeavoring only to enforce an internal regulation, and not primarily motivated to influence an employer's selection, can deprive the employer of the protection afforded by the statute. Consequently, we find the *Chewelah* limitation inconsistent with the central aim of § 8(b)(1)(B).

Next, the Union attempts to escape the dictates of the statute by characterizing Willey as an "employer." The Union reasons that the use of the master's certificate to obtain electrical permits is a responsibility more akin to an employer, rather than a supervisory, function. Then, claiming that it disciplined Willey primarily for his use of the certificate, the Union urges that the statute does not condemn sanctions imposed on a member for engaging in strictly employer activities.

It is true that the Board has consistently held § 8(b)(1)(B) inapplicable in cases where the member is the owner of the business. *See, e.g., Glaziers and Glassworkers, Local 1621*, 221 NLRB 509 (1975). In analyzing whether the member-supervisor is indeed the employer, and thus unprotected by the statute, the Board focuses on the extent, if any, of the individual's financial ownership in the company. *See* 221 NLRB at 513. The reason for this rule is apparent. When a person has a financial self-interest in the enterprise, "it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it." *Id.* NLRB at 512. Moreover, the application of § 8(b)(1)(B) in that situation would, through the subterfuge of protecting the employer's selection of his representative, effectively deprive a union of all

economic weapons, merely because the employer assumes the additional role of a supervisor. As the Board has noted, Congress certainly did not intend that result. *See id.* at 512-13.

The Union's assertion that Willey's mere use of the master's certificate places him within the ambit of this rule misconstrues its rationale. Essentially, the Union confuses ownership with management duties. Supervisory personnel, by their very nature, often undertake numerous tasks closely associated with an employer's role, such as Willey's acquisition of electrical permits in this case. In effect, a supervisor acts as a managerial agent for the employer. However, this responsibility does not necessarily create the personal stake inevitably present when the individual possesses a financial interest in the company. Without that participation, there is no assurance that union pressure will not adversely affect the supervisor's performance of his collective-bargaining and grievance-adjustment duties. Thus, managerial responsibility, standing alone, does not negate the applicability of § 8(b)(1)(B).

On that basis, the Union's argument must fail. The uncontroverted testimony before the ALJ established that Willey owned no stock or other financial interest in Drexel. Without such a personal stake, his responsibility in obtaining electrical permits does not justify an exemption from the statute's coverage.[10]

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[10] Implicit in this approach is a related contention based on the Union's characterization of the master's certificate as an "employer function." It essentially claims that since *Florida Power & Light* construes the statute only to prohibit sanctions imposed for the exercise of supervisory duties, and use of the master's license is an employer rather than a supervisory undertaking, discipline for that purpose does not offend § 8(b)(1)(B). As previously noted, we are unconvinced by the Union's attempt to distinguish between employer and supervisory functions, in that the distinction ignores the inherently managerial nature of a supervisor's role. Moreover, mere labels do not control the existence or absence of a violation. *See American Broadcasting Cos.*, 437 U.S. at 430, 98 S.Ct. at 2484, 57

The order of the Board is ENFORCED.

L.Ed.2d at 328 (not all discipline imposed for performance of "supervisory work" is necessarily unlawful). Rather, the inquiry focuses on the *effect* of the discipline on the employer's selection of a representative to perform the pertinent duties. The Board found an equal adverse effect in the sanctions imposed for using the certificate as it did with the discipline resulting from Willey's association with a nonunion employer. As the Board noted, "[i]t is part and parcel of the same violation." Recognizing that this finding of the requisite effect is "peculiarly the kind of determination that Congress has assigned to the Board," *American Broadcasting Cos.*, 437 U.S. at 432, 98 S.Ct. at 2435, 57 L.Ed.2d at 330, we see no reason to disturb the Board's conclusion.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case 12-CB-2052

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323 (Drexel Properties, Inc.)

and

JOHN E. WILLEY, an Individual

Bruce Harris, Esq., of Coral Gables, FL, for the General Counsel.

Joseph H. Kaplan, Esq., of Miami, FL, for the Respondent.

Jeffrey R. Cooper, Esq., of Miami, FL, for the Charging Party.

DECISION

Statement Of The Case

PETER E. DONNELLY, Administrative Law Judge: The charge herein was filed by John E. Willey, an individual, herein called Charging Party or Willey, on January 15, 1979, and a complaint thereon was issued on February 21, 1979.[1] An

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[1] Certain jurisdictional allegations of the complaint were amended at the hearing to reflect the correct location of Drexel Properties, Inc., herein called Employer or Drexel, as having its principal office in Fort Lauderdale, Florida with a facility in Boynton Beach, Florida. The complaint (paragraph 8(a)) was further amended to reflect that Willey has been a member of IBEW Local 725 in Terre Huate,

answer thereto was timely filed by Respondent. Pursuant to notice, a hearing was held before the Administrative Law Judge at Coral Gables, Florida on May 29, 30 and June 31, all in 1979. Briefs were timely filed by Respondent and General Counsel which have been duly considered.

FINDINGS OF FACT

I. Employer's Business

Employer is a Florida corporation with its main office in Fort Lauderdale, Florida and a facility at Boynton Beach, Florida where it is engaged in the business of land development and construction enterprises. During the past 12-month period, in the course and conduct of its business operations, Employer purchased and received goods and materials valued in excess of $50,000 at its Florida facilities which were shipped to it directly from points outside the State of Florida. Based upon the above facts I conclude that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Labor Organization

The complaint alleges, the Respondent and its answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

Indiana since October 1952 and a new paragraph 8(b) was added to alleged that from July 1970 until 1975 Willey had a working permit issued by International Brotherhood of Electrical Workers, Local Union No. 323, herein called Respondent or Local 323. Paragraph 15 of the complaint was amended to read as follows:

> At a meeting of Respondent's trial board on or about January 15, 1979, Respondent attempted to collect the balance of the fine imposed upon the Charging Party by Respondent on October 27, 1977, and by certified letter dated January 18, 1979, Respondent's International Union notified Charging Party that his appeal of the trial board's decision of October 27, 1977 had been denied.

III. Alleged Unfair Labor Practices

The basic contention of the complaint is that Willey, a supervisor for Drexel, was tried, fined, and expelled from the IBEW because he was working for a nonunion employer, Drexel, and that such conduct constitutes restraint and coercion of an employer in the selection of its representatives for the purposes of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.

A. The Facts

1. Willey's Union and Employment History

Prior to coming to Palm Beach County, Florida, in about July 1970 Willey had lived in Terre Haute, Indiana, where he had worked as an electrician and was a member of IBEW Local 725 in Terre Haute. After his arrival in Florida, Willey obtained a work permit from Respondent and obtained employment by referral through the Respondent's hiring hall. Willey maintained this permit, making payments to Respondent until December 1975. He also continued to make payment on his membership dues to Local 725 and did so until his expulsion from membership in the IBEW in January of 1979. In about October of 1975 Willey began his employment with Drexel as electrical superintendent. Drexel is a nonunion employer and has no contract with Local 323. Willey is a salaried employee on Drexell's payroll. His immediate supervisor is William Cox, Jr., vice president of Drexel. Willey has overall responsibility for all the electrical work performed by Drexel including the authority to hire and fire employees. In addition, his duties include the disposition of complaints and grievances, imposition of disciplinary action, assignment of work, and approval of vacation requests.

In addition to these supervisory functions, Willey is certified as a master electrician. By reason of this certification Willey is qualified to operate as a contractor. By reason thereof, he is also qualified to obtain electrical work permits for Drexel which he apparently does on a regular basis. In so doing, Willey

accepts responsibility for the performance of the electrical work covered by the permit.

Willey testified, without contradiction, that he is not an officer or owner of Drexel, nor a shareholder, nor does he share in the profits of Drexel. Willey testified that he signs electrical permit applications, but does so as Drexel's agent, rather than as a contractor in his own right, although he is himself qualified as an electrical contractor.

2. Charge of September 16, 1977

On September 16, 1977, C. E. Singletary, business manager of Respondent at that time, perferred written charges against Willey. The only violations set out in this charge (General Counsel's Exhibit No. 2) involve Article XXVII, Section 1, Subsections 10 and 21 of the IBEW Constitution.[2] They read:

ARTICLE XXVII

MISCONDUCT, OFFENSES AND PENALTIES

Sec. 1. Any member may be penalized for committing any one or more of the following offenses:

* * *

(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W.

* * *

(21) Working for any individual or company declared in difficulty with a L.U. or the I.B.E.W., in accordance with this Constitution.

* * *

The body of the charge reads: "This member is running a nonunion electrical contracting business."

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[2] The Constitution was amended in 1978, however, the parties stipulated that none of the changes affect these proceedings.

By letter dated October 7, 1977, Willey was notified to appear before the trial board of the Respondent on October 25, 1977 to answer these charges.

At the trial, the charges were read to him and some discussion ensued. During the course of the discussion, Willey conceded that he was "qualifying" i.e., obtaining electrical work permits on behalf of Drexel through the use of his master license. Willey admitted that he was so doing and was advised that this activity violated the area working agreement (Inside Wiremen Working Agreement). Article II, Section 2.01 of the contract reads:

ARTICLE II

EMPLOYER RIGHTS—UNION RIGHTS

SECTION 2.01. NO MEMBER OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, OR OTHER EMPLOYEES, SUBJECT TO EMPLOYMENT BY EMPLOYERS OPERATING UNDER THIS AGREEMENT, SHALL HIMSELF BECOME AN EMPLOYER FOR THE PERFORMANCE OF ANY ELECTRICAL WORK. ANY MEMBER, OR OTHER EMPLOYEE, POSSESSING A MASTERS LICENSE WHILE EMPLOYED UNDER THE TERMS OF THIS AGREEMENT, SHALL MAINTAIN SAME ON AN INACTIVE STATUS. ANY EMPLOYER WORKING UNDER THIS AGREEMENT SHALL NOT TAKE OUT A PERMIT OR MASTER A JOB FOR ANY OTHER PERSON OR FIRM, EXCEPT IN THE CASE OF A TRUE JOINT VENTURE.

Willey testified as to the constitutional violations:

JUDGE DONNELLY: Okay.

What was the explanation that you got of the nature of the charge?

THE WITNESS: That I was working in violation of the IBEW Constitution and it was, of course, naturally written out that—what sections I was working in conflict with the—I was working for a company that was in conflict with the best interest of

the IBEW and I don't remember all the details of the other charges were.

JUDGE DONNELLY: Did anyone tell you, explain to you, why you should not do that it is that you were doing?

THE WITNESS: No, sir. I can't say that they didn't, but I do not remember of anybody saying, you know,—

JUDGE DONNELLY: (Interposing) So, in other words, then what they were doing was reciting those portions of the Constitution that were supposed to have constituted the violation.

THE WITNESS: Yes, sir.

JUDGE DONNELLY: Your offense.

THE WITNESS: Now they did state the fact that I was qualifying Drexel Properties as a contractor.

JUDGE DONNELLY: Right.

What did they say about that?

What was said about that?

THE WITNESS: Well, that Drexel Properties Properties did not have a working agreement with 323 and was in violation of the International Constitution.

JUDGE DONNELLY: And it was said that that was—that those facts constituted a violation of the international agreement [Constitution]?

THE WITNESS: Yes, sir.

Willey also testified, that he was told by Claude Marshall, president of Respondent and a member of the trial board at this time, that he should quit his job and leave the territory of Local 323.[3] While it appears that the matter of Willey qualifying

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[3] While Marshall denies ever saying anything to Willey at the hearing, Marshall's recollection of this meeting however is limited and I find Willey's testimony more convincing.

Drexel as a violation of Section 2.01 of the area contract was raised at the trial, it does not appear to have been the basis for any action taken by the trial board since the minutes of the trial and the letter of October 27, 1977 advising Willey of the trial board's action do not refer to it. The October 27, 1977 letter from Respondent's Recording Secretary to Willey reads:

> The Executive Board, sitting as a Trial Board of Local Union 323, I.B.E.W., West Palm Beach, Florida, on October 25, 1977, after due consideration of the evidence produced, has acted upon the charges filed against you by Brother C. E. Singletary.
>
> You were found guilty of a violation of Article XXVII, Section 1, Subsection 10, of the I.B.E.W. Constitution and assessed $1,000.00 for this violation, $750.00 to be suspended provided you get right with the Local Union within 30 days and commit no further violations for a period of one year.
>
> You were found guilty of a violation of Article XXVII, Section 1, Subsection 21, of the I.B.E.W. Constitution and assessed $1,000.00 for this violation, $750.00 to be suspended provided you get right with the Local Union within 30 days and commit no further violations for a period of one year.
>
> This constitutes a total of two violations for a total assessment of $2,000.00, 1,500.00 to be suspended provided you get right with the Local Union within 30 days of notification of this action, which would leave a balance of $500.00 owed this Local Union.
>
> It is my duty to inform you that in accordance with Article XXVII, Section 12, of the IBEW Constitution, under "appeals," any member who claims an injustice has been done him by any Local Union or Trial Board, may appeal to the International Vice President of the 5th District, Dan H. Waters, Suite 113, No. 2 Metroplex Drive, Birmingham, Alabama 35209, anytime within 45 days after the date of the action complained of; and Section 13, "No appeal for revocation of an assessment shall be recognized unless the member has first paid the assessment, which he can do under protest. When the assessment exceeds twenty-five dollars ($25.00), payments of not less than twenty dollars ($20.00) in monthly installments must

be made. The first monthly installment must be made within fifteen (15) days from the date of the decision rendered and monthly installments continued thereafter or the appeal will not be considered.

By letter dated November 7, 1977, Willey advised Respondent of his intention to appeal the trial board's decision. On December 1, 1977 Willey wrote a letter to Dan H. Waters International Vice President, which Waters treated as an appeal. By letter dated December 8, 1977 Waters assigned a representative to investigate the matter and on December 20, 1977 wrote a letter to Willey stating:

> By letter dated December 1, 1977, you wrote to me in the form of an appeal from actions of the Trial Board of IBEW Local Union 323, West Palm Beach, Florida.
>
> Your appeal was acknowledged by letter dated December 8, 1977. In this letter, you were also advised that International Representative John Erickson of my Staff would conduct an investigation of your appeal. I am now in receipt of a detailed report of Representative Erickson's findings.
>
> After carefully reviewing the Trial Board minutes, evidence submitted to the Board, and correspondence in this case, I am of the opinion your guilt was established without a reasonable doubt. Furthermore, you made no attempt to dispute the fact you are employed by a firm who does not have an agreement with Local 323.
>
> The Trial Board afforded you a fair trial and all due process in accordance with the IBEW Constitution.
>
> Taking the above into consideration, along with the serious nature of the violation, I see no valid reason to reverse the decision to the Trial Board.

DECISION

> The findings of guilty of violating Article XXVII, Section 1, subsections 10 and 21 of the IBEW Constitution by the Trial Board of Local Union 323 in the case of John E. Willey are hereby upheld.
>
> The assessment of $1,000 for each charge is hereby reduced to $500 for each charge. This reduction is con-

ditioned on the appellant's immediate cessation of the violation he was found guilty of by the Trial Board in this instant case.

On January 23, 1978 Willey wrote to Charles H. Pillard, International President, appealing Waters' decision of December 30, 1977. On January 31, 1978 Pillard wrote to Willey saying:

> This will acknowledge your letter dated January 23, 1978 in which you are appealing a decision rendered by International Vice President Dan H. Waters under date of December 30, 1978.
>
> I am requesting the International Vice President to furnish me with his file in the case. After I have received the file and have had an opportunity to study the material contained therein, you will be advised as to the position of this office relative to your appeal.

On April 13, 1978 Pillard again wrote to Willey referring him to the International Constitution's provisions to the effect that appeals from the International Vice President are not recognized until the decision has been complied with or the provision is waived by the Vice President. On June 19, 1978 Willey wrote to Waters requesting a suspension of the "cease and desist part of the decision against me."

On January 15, 1978 in a letter appealing a second decision of the trial board on December 5, 1979, Willey complained that his appeal on the first trial board decision was still pending because his letter to Waters of June 19, 1978 was still unanswered. By letter dated January 18, 1979 Waters advised Willey:

> This is to acknowledge your letter of January 15, 1979, regarding an appeal of a decision of the Trial Board of IBEW Local Union 323, West Palm Beach, Florida.
>
> Please be advised that according to the records of this instant case, you have exhausted your appeals as outlined in Article XXVII of the IBEW Constitution.

3. Charge Of October 24, 1978 And Willey's Expulsion From IBEW

October 24, 1978 C. F. Griffin, assistant business manager of Respondent, preferred written charges against Willey. This charge, like the charge of October 15, 1977, cited violations of Article XXVII, Subsections 1(10) and (21) and in addition recited a violation of Article II, Section 2.01 of the area labor agreement, quoted above. The explanation of the charge reads:

> Drexel Const. Co. is using John E. Willey Electrical Masters license. Drexel is the only construction company in Green Tree Village.
> John E. Willey License # U9420.

Upon notice, a trial was held on these charges, attended by Willey, on December 5, 1978. At this time the above sections of the area contract and Constitution were read to him and Willey complained that he had the same charges pending on appeal. He was advised by James Hayes, chairman of Respondent's trial board, that his appeal had been denied by Waters. Hayes testified that Willey was advised that he was in violation of the area contract and the Constitution by using his masters license as a contractor; that his masters' license should be maintained on an inactive status; that masters' licenses are a contractor's responsibility and he should not have been using his for Drexel. He was told that he would have to stop using his masters' license as a contractor.

With respect to the matter of the charges relating to the Constitution, Hayes testified that these were separate charges, stating:

> Q. Well, what was the basis for that violation?
>
> A. Which?
>
> Q. For finding him in violation of Article 27, Section 1, Subsection 10.
>
> A. Working in the interest of an organization or cause which is detrimental to, or opposed to, the IBEW.

Section 10 is working in the interest of an organization or cause which is detrimental to, or opposed to, the IBEW.

That had nothing to do with his masters license; 10 or 21.

Q. Then how did the Trial Board find him in violation of that section?

A. Of 10?

Q. Yes.

A. That company was not signatory to our working agreement.

Q. What about Section 21?

A. Same thing.

Q. Would you repeat what that reason is?

A. Let me look at it first.

That his company had people working for them that wasn't paying the benefits and was not signatory to our working agreement.

Q. And that is the reason he was found in violation of those Constitutional provisions?

A. Of the two Constitutional provisions.

That is just one part of it. Well, one side of it.

By letter dated December 7, 1978 Willey was notified of the action of the trial board. The letter reads:

The Executive Board, sitting as a Trial Board of Local Union 323, I.B.E.W., West Palm Beach, Florida, on December 5, 1978, after due consideration of the evidence produced, has acted upon the charges filed against you by Brother C. F. Griffin.

You were found guilty of Article II, Section 2.01 of the Working Agreement and assessed $1,500.00 for this violation.

Your were found guilty of Article XXVII, Section 1, Subsection 10 of the IBEW Constitution and assessed $2,000.00 for this violation.

> You were found guilty of Article XXVII, Section 1, Subsection 21, of the IBEW Constitution and assessed $1,650.00 for this violation.
>
> This constitutes three violations for a total assessment of $5,150.00 due and owing this Local Union.
>
> It is my duty to inform you that in accordance with Article XXVII, Section 12, of the IBEW Constitution, under "appeals," any member who claims an injustice has been done him by any Local Union or Trial Board, may appeal to the International Vice President of the 5th District, Dan H. Waters, Suite 113, No. 2 Metroplex Drive, Birmingham, Alabama 34209, anytime within 45 days after the date of the action complained of and Section 13, "No appeal for revocation of assessment shall be recognized unless the member has first paid the assessment, which he can do under protest. When the assessment exceeds twenty-five dollars ($25.00), payment of not less than twenty dollars ($20.00) in monthly installments must be made. The first monthly installment must be made within fifteen (15) days from the date of the decision rendered and monthly installments continued thereafter or the appeal will not be considered."

On January 9, 1979 Willey was requested, by letter, to meet with the trial board on January 15, 1979. At the trial board meeting January 15, 1979, Willey complained that his appeal on the original charge was still pending, but he was advised by Hayes that he would have to pay the original fine on the first charge and that they could then drop the charges and fines on the second charge. Willey was unwilling to compromise and by letter dated January 19, 1979 Willey was expelled by Respondent from membership in the International Brotherhood of Electrical Workers. This letter reads:

> The Executive Board, sitting as a Trial Board of Local Union, 323, I.B.E.W., West Palm Beach, Florida, on January 15, 1979, after due consideration of the testimony produced, has acted on a decision stemming from charges filed against you by Brother C. E. Singletary and subsequent charges by Brother C. F. Griffin.
>
> It is the decision of the Trial Board to expel you from membership in the I.B.E.W.

B. Analysis And Recommendation

1. Impact Of 10(b)[4] On The October 27, 1977 Fine

Respondent took the position at the hearing that the allegations of the complaint concerning the fine levied by the Respondent against Willey in October of 1977 were outside the 10(b) period and therefore time barred in the instant proceeding since no complaint could issue in this case based on any unfair labor practices occurring before July 15, 1978.

The rationale of the Respondent's position appears to be that final action on the fine took place as of April 13, 1978 the date on which Pillard wrote to Willey advising him that he could not recognize his appeal.

The General Counsel on the other hand, takes the position, that certain action by the Respondent relating to the fine occurred within the 10(b) period and were sufficient to bring the matter of the October 1977 fine within the 10(b) period.

The record discloses that, within the 10(b) period, the second charge was filed against Willey containing one charge identical in composition to the original charge i.e., violations of Article XXVII, Sections 1(10) and (21) of the Constitution.

Indeed, the part of the second charge relating to the Constitutional violation was in essence, little more than an extention or continuation of the original charge since the factual basis of the charges were the same. As a consequence of trial board decisions as to both charges, a hearing was held on January 19, 1979 to consider the matter of Willey's expulsion, and pursuant to this hearing Willey was expelled. Clearly Willey's expulsion was occasioned by his failure to comply with the decisions of the trial board as to all of the outstanding charges. In my opinion final action on Willey's discipline did not

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[4] Section 10(b) of the National Labor Relations Act provides, *inter alia;* "That no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. . . ."

occur until he was expelled by reason of his failure to comply with the discipline imposed by the trial board in *both* cases. This occurred within the 10(b) period, making the allegations relating to both properly subject to the complaint, especially since the allegations relating to the Constitutional violations were the same in both charges, indeed the identical alleged misconduct.

2. The 8(b)(1)(B) Allegations

Section 8(b)(1)(B) provides that "It shall be unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;" The Board has, in several cases, held that a supervisor within the meaning of the Act is also an employer representative within the meaning of Section 8(b)(1)(B). This record establishes, beyond cavil, that Willey exercises supervisory functions on behalf of the Respondent that constitute him a supervisor within the meaning of the Act, and consequently an employer representative under Section 8(b)(1)(B). *Local Union No. 673, International Union of Operating Engineers, AFL-CIO (Westinghouse Electric Corporation)*, 229 NLRB 726.

It has also been held by the Board that firing supervisor because they work for a nonunion employer also violates Section 8(b)(1)(B) of the Act. *New Mexico District Council of Carpenters (A. S. Horner, Inc.)* 177 NLRB 500, enfd., 454 F.2d 1116 (C.A. 10, 1972).

Let us now review the record to determine whether or not these principles are applicable to the instant case.

First, let us consider those charges that Willey violated the IBEW International Constitution. The Language of Article XXVII, Sections 1(10) and (21) are somewhat vague but clearly provide discipline for members who work for employers or organizations deemed "in difficulty with, "detrimental," or "opposed" to the IBEW.

The original September 16, 1977 charge filed by Singletary, alleging only Constitutional violations, recited, by the way of explanation, that Willey is "running a nonunion electrical contractor business." At this time Willey was employed by Drexel as electrical superintendent. At his trial Willey was advised that he should quit his job and leave the area of Local 323. The letter advising him of the trial board's action refers only to the Constitutional violations. Waters, in his letter of December 30, 1977 upholding the trial board states that after a careful review of the record he was satisfied that Willey was guilty, and as a basis for reaching his conclusion notes that Willey, "made no attempt to dispute the fact that you [Willey] are employed by a firm who does not have an agreement with Local 323." Based upon these facts and the entire record I am persuaded that Willey was fined and his appeal denied because he was working for a nonunion contractor.[5]

The Board has held that such disciplinary action, taken against a supervisor-member, has the effect of depriving the employer of the services of its selected representative for the purposes of collective bargaining or the adjustments of grievances. *New Mexico District Council of Carpenters (A. S. Horner, Inc.,) supra.*

Turning now to the second charge filed against Willey on October 24, 1978, it is clear that one of the two allegations therein applies to the Constitution and is identical to the prior charge of September 16, 1977. The record discloses that the same objectives were being pursued as in the original charge and relate to the same objectionable conduct by Willey, that is, to force Willey out of his employment with a nonunion contractor. This portion of the charge is nothing more, in essence, than a renewal of the original charge. If any further evidence of

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[5] Contrary to the contention of the Respondent, I conclude that the basis for this disciplinary action was the IBEW Constitution. While Section 2.01 of the area contract was apparently discussed, it does not appear to have been the motivating consideration in the imposition of the discipline.

the Respondent's objective is necessary, the remarks of James Hayes, quoted above, present clear and convincing evidence that Willey's basic transgression was that he was employed by a nonunion contractor.

The other allegation in the October 24, 1978 charge alleges that Willey violated Section 2.01 of the area agreement quoted above by using his masters license to obtain electrical construction permits for Drexel in the face of this sections' requirement that he maintain his masters license in an inactive status.

In examining this contention, a simple reading of the language itself makes it apparent that Willey is not employed "under the terms of this agreement." Not only is Willey not a member of Respondent, but Drexel was a nonunion contractor, not subject to or bound by the area contract. However, even assuming that the area agreement can be applied to Willey and Drexel, I am not persuaded that the Respondent would be absolved. Respondent contends that the discipline was purely an internal union matter based solely on Willey's refusal to put his masters license on an inactive status while working for Drexel. The masters' license itself carries with it inherent supervisory authority. It is by reason of this masters license that Willey is able to obtain electrical construction contracts for Drexel which contemplate the exercise of overall supervisory authority which supervisory authority Willey represents in the electrical permit application he will undertake and which he does undertake in his capacity as electrical superintendent for Drexel. In these circumstances it cannot be said that Willey's discipline is an internal union matter since the necessary result of the disciplinary action is to restrict Willey in the exercise of supervisory functions. Such discipline imposed on a supervisor-member constitutes coercion of an employer in the selection of his representative for the purposes of collective bargaining and the adjustment of grievances. Compare, *Teamsters Local 63, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent (Continental Oil Company)*, 193 NLRB 581.

Respondent also argues that Willey is himself acting as a contractor in violation of the first sentence of Section 2.01 stating that "No member of the International Brotherhood of Electrical Workers, or other employees, subject to employment by employers operating under this agreement, shall himself become an employer for the performance of any electrical work." Once again, this provision does not apply to Willey since Drexel is a nonunion employer, not an employer "operating under this agreement." But even assuming that the area agreement does apply, it is my conclusion that Willey is not himself an "employer" so as to be in violation thereof. Willey is not an owner, he is a salaried employee of Drexel. He does not share in any of the profits of Drexel. While it appears that Willey is certified as an electrical contractor, in that he meets the state and local requirements to qualify as such, he is not himself an employer or owner so as to exempt him as employer from the application of Section 8(b)(1)(B). *International Brotherhood of Electrical Workers Local Union 73, AFL-CIO (Chewelah Contractors, Inc.,)* 231 NLRB 809.

In summary, I conclude that the Respondent's action in disciplining Willey was not privilege either by the IBEW Constitution or by the area labor agreement and further by disciplining him, Respondent has violated Section 8(b)(1)(B) of the Act.

IV. The Effects Of The Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth in section III, above, have a close and intimate relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in, and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action

designed to effectuate the policies of the Act. Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in this case, I hereby make the following:

CONCLUSIONS OF LAW

1. Drexel Properties, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. John E. Willey is, and has been at all times material, a supervisor within the meaning of Section 2(11) of the Act, selected by the Employer for the purposes among others, of collective bargaining and the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By the above action in disciplining Willey, the Respondent restrained and coerced Drexel in these election and retention of its representatives for the purposes of collective bargaining or the adjustments of grievances, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

Upon the foregoing findings of facts, conclusions of law and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:[6]

ORDER

The Respondent, International Brotherhood of Electrical Workers, Local Union No. 323, its officers, agents, and representatives shall:

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[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulatins, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Restraining and coercing Drexel Properties, Inc., in the selection of representatives for the purposes of collective bargaining or the adjustments of grievances.

(b) Preferring charges against or requiring John E. Willey to appear before a trial board; fining, attempting to collect fines, expelling, or otherwise jeopardizing the union membership of John E. Willey, or any other representative of Drexel Properties, Inc., for acts performed during the course of his or their duties as representatives of Drexel Properties, Inc.

(c) In any other manner restraining or coercing Drexel Properties, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustments of grievances.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Expunge all record of the disciplinary action taken against John E. Willey.

(b) Rescind any and all fines levied against John E. Willey and refund to him any money that may have been paid to Respondent as a result of such fine, together with interest thereon to be computed in the manner proscribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[7]

(c) Reinstate John E. Willey as a member in good standing of International Brotherhood of Electrical Workers.

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[7] See generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). General Counsel filed a supplemental brief in support of a remedial interest rate of 9 percent, however, absent modification the Board's policy, I am constrained to follow the above existing Board formula.

(d) Notify John E. Willey, Drexel Properties, Inc., IBEW Local No. 725, and International Brotherhood of Electrical Workers, that it has taken the aforesaid remedial action and that it will in the future comply with the cease and desist provisions of this Order.

(e) Post at its offices and any place where its meetings are customarily held, copies of the attached marked "Appendix."* Copies of said notices on forms provided by the Regional Director for Region 12, after being duly signed by an official representative of Respondent, shall be posted by it immediate upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Mail signed copies of the notice to the Regional Director for posting, Drexel Properties, Inc., willing, at all locations where notices to its employees are customarily posted.

(g) Notify the Regional Director for Region 12, in writing, within 20 days from the date of receipt of this Decision what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. March 6, 1980.

/s/ PETER E. DONNELLY
Peter E. Donnelly
Administrative Law Judge

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* In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES AND MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT restrain or coerce DREXEL PROPERTIES, INC., in the selection of representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL NOT prefer charges against or require JOHN E. WILLEY to appear before a trial board; fine, attempt to collect fines, expell, or otherwise jeopardize the union membership of JOHN E. Willey or any other representative of DREXEL PROPERTIES, INC., for acts performed during the course of his or their duties as representatives of DREXEL PROPERTIES, INC.

WE WILL NOT in any other manner restrain or coerce DREXEL PROPERTIES, INC., in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL expunge all record of the disciplinary action taken against JOHN E. WILLEY.

WE WILL rescind any and all fines levied against JOHN E. WILLEY and refund to him any money that may have been paid to IBEW LOCAL 323 as a result of such fines, together with interest thereon.

WE WILL reinstate JOHN E. WILLEY as a member in good standing of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS.

WE WILL notify JOHN E. WILLEY, DREXEL PROPERTIES, INC., IBEW LOCAL NO. 725, and INTERNA-

TIONAL BROTHERHOOD OF ELECTRICAL WORKERS that we have taken the aforesaid remedial action.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323

(Drexel Properties, Inc.

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12—CB—2052

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323 (Drexel Properties, Inc.)

and

JOHN E. WILLEY, an Individual

DECISION AND ORDER

On March 6, 1980, Administrative Law Judge Peter E. Donnelly issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting Brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

Chairman Fanning, in his separate opinion, distinguishes between the fine levied against John Willey for working for a nonunion employer and the one levied againt him for using his master's license for the benefit of that employer. We see no basis for making such a distinction. In suggesting that the latter fine did not restrain Drexel's choice of its grievance-handling representative, the Chairman assumes that the job

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[1] In his recommended Order, the Administrative Law Judge inadvertently referred to *F. W. Woolworth Company*, 90 NLRB 289 (1950), for the interest formula. We shall therefore modify his recommended Order accordingly.

functions Willey performed and the qualifications therefor can be parsed. We disagree. Drexel needed an electrical superintendent who had a master's license and would use that license on its behalf. Prohibiting Willey from so using his license, as Respondent's fine would do, surely amounts to an attempt to influence Drexel's selection of Willey as its electrical superintendent every bit as much as a flat attempt to prohibit him from working for this nonunion employer. It is part and parcel of the same violation. For that reason and those contained in the Decision of the Administrative Law Judge, we find Respondent's exception to be without merit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 323, West Palm Beach, Florida, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

Substitute the following for paragraph 2(b):

"(b) Rescind any and all fines levied against John E. Willey and refund to him any money that may have been paid to Respondent as a result of such fines, together with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977)."

Dated, Washington, D.C. May 11, 1981

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN FANNING, concurring in part and dissenting in part:

This is another decision which extends the reach of Section 8(b)(1)(B). I have previously expressed my concern that the Board recognize reasonable limits to this section of the Act,[2] and I dissent from part of the decision.

The union conduct attacked by the 8(b)(1)(B) complaint here was Respondent's discipline of John Willey, member of a sister local who was working under a permit from Respondent. Willey was electrical superintendent for Drexel Properties, Inc., a land developer and construction contractor. His duties as superintendent included the disposition of employee complaints and grievances, and, therefore, he was a grievance adjuster for Drexel within the meaning of Section 8(b)(1)(B). In addition, Willey was a certified master electrician, and through use of his master's licence obtained electrical work permits from the county to enable Drexel to perform electrical contracting.

Respondent brought internal union charges against Willey, and after various proceedings fined him for violating the International constitution by working for a company which did not have a working agreement with Respondent and for violating the working agreement by failing to place his master's license in an inactive status and, instead, using it to qualify Drexel for electrical work permits. Willey did not pay the fine and was expelled from membership in the IBEW.

It appears, then, that union discipline was imposed on Willey for two reasons—one, because he was working for a nonunion employer, and two, because he was using his master's license to obtain electrical permits for his employer. I note that neither of Willey's offenses occurred by reason of his position as an 8(b)(1)(B) representative or his performance of grievance-adjustment duties. Indeed, the discipline does not seem to have been aimed at interfering with Drexel's selection or con-

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[2] See, for example, my dissenting opiniong in *New York Typographical Union No. 6, International Typographical Union, AFL-CIO (Daily Racing Form, a subsidiary of Triangle Publications, Inc.)*, 216 NLRB 896 (1975).

trol of Willey as a grievance adjuster or collective bargainer. Rather, it seems to have been directed at discouraging union members from working for nonunion employers in any capacity and from qualifying employers as contractors by use of their master's licenses. Arguably, these goals are matters of legitimate concern to a labor organization in controlling its members and protecting its own interests. Nevertheless, an 8(b)(1)(B) violation may be warranted based upon a probable adverse impact the discipline might have had upon Willey's assumption or discharge of grievance-adjustment or bargaining functions and the resulting indirect pressure upon his employer.

I concur with my colleagues in finding that Respondent's imposition of discipline upon Willey for the first reason—because he worked for a nonunion employer—contravened Section 8(b)(1)(B). Acquiescence in Respondent's demands would have required Willey to abandon his employment with Drexel and his superintendent's duties which included adjusting grievances. Consequently, the discipline imposed for the first reason would have had the likely result of making Willey unavailable to Drexel for use as an 8(b)(1)(B) representative. Authority supports the view of my colleagues that union discipline which has the effect of depriving an employer of the grievance-adjustment services of an individual it has selected to perform those duties violates Section 8(b)(1)(B).[3]

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[3] See *American Broadcasting Companies, Inc., et al.* v. *Writers Guild of America, West, Inc., et al.*, 437 U.S. 411 (1978), accepting as reasonable the view of the Board majority in *Writers Guild of America, West, Inc. (Association of Motion Picture and Television Producers, Inc., et al.)*, 217 NLRB 957 (1975). See also *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 1977 NLRB 500 (1969), enfd. 454 F.2d 1116 (10th Cir. 1972), and *International Brotherhood of Electrical Workers, Local Union No. 73, AFL-CIO (Chewelah Contractors, Inc.)*, 231 NLRB 809 (1977), relied upon by the Administrative Law Judge. I dissented from the Board's decision in the *American Broadcasting* case, and I did not participate in *Horner* or *Chewelah*.

However, I cannot agree with the majority's conclusion that Respondent's discipline of Willey because of his use of the master's license violated Section 8(b)(1)(B). I see no reason to assume that discipline for this reason would have had an adverse effect upon Willey's willingness or availability to accept grievance-adjustment assignments or his independence and capacity in carrying out such responsibilities. Conforming to Respondent's requirement that he place the license in inactive status might have deterred Willey from using the license to obtain permits for Drexel, but it would not have impaired his effectiveness as Drexel's 8(b)(1)(B) representative. It would appear that Willey could have continued to work for Drexel and fulfill all his grievance-adjustment functions without a master's license. His use of the license in Drexel's behalf while acting as electrical superintendent in no way related to the performance of the grievance-adjustment duties of that position. Therefore, I do not think Respondent's restraint of Willey with regard to his master's license can be deemed to have resulted in pressure upon Drexel in its selection of an 8(b)(1)(B) representative or its authority over that representative.

The majority's contrary position seeks to extend Section 8(b)(1)(B) yet further despite judicial admonition of its limited scope. See *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, et al.*, 417 U.S. 790 (1974). Now, we are told, employers need only be affected to be "restrained" by otherwise lawful union action against members and bring the weight of 8(b)(1)(B) sanctions to bear on labor organization. And the test is to be subjective: Drexel's assertion that a superintendent must have a master's license. There would, of course, be no violation of Section 8(b)(1)(A) had Respondent disciplined an employee-member in these circumstances. Drexel's need, thus, is laid bare: To manipulate the Act. Drexel is no more entitled to the benefits of a supervisor's master's license under Section 8(b)(1)(B) than Florida

Power & Light Co. was to a supervisor's performance of unit work.

Dated, Washington, D.C. May 11, 1981

John H. Fanning, *Chairman*

NATIONAL LABOR RELATIONS BOARD

No. 83-63

In the Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 323, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board reasonably concluded that the Union unlawfully restrained and coerced an employer's selection of a grievance-handling supervisor by fining and expelling a member holding that position because his employer was nonunion.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 703 F.2d 501. The decision and order of the National Labor Relations Board (Pet. App. 37a-42a) and the decision of the administrative law judge (Pet. App. 15a-36a) are reported at 255 N.L.R.B. 1395.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, is set forth in Pet. 2.

STATEMENT

1. The conduct at issue here is petitioner's discipline of John Willey, a member of Local 725 of the International Brotherhood of Electrical Workers ("IBEW") (Pet. App. 17a). Willey was electrical superintendent for Drexel Properties, Inc., a nonunion land developer and construction contractor in Florida (Pet. App. 16a-17a). His duties as superintendent included the disposition of employee complaints and grievances (Pet. App. 17a). Willey was a certified master electrician and, through use of his master's certificate, obtained electrical work permits from the county to enable Drexel to perform electrical contracting (Pet. App. 17a-18a). Willey was a salaried employee of Drexel; he neither shared in its profits nor held any ownership interest in it (Pet. App. 18a).

Petitioner brought internal union charges against Willey and, after various proceedings, fined him a total of $7,150 for allegedly violating the International IBEW constitution and the area working agreement by working for Drexel, a nonunion company, and using his master electrician's certificate to obtain electrical work permits for Drexel (Pet. App. 37a, 18a-26a). Thereafter, petitioner offered to suspend $5,150 of the fines if Willey would pay the remaining $2,000. When Willey refused on the ground that he was appealing the fines, petitioner expelled him from the IBEW (Pet. App. 26a).

2. The Board, in agreement with the administrative law judge, found that petitioner coerced and restrained Drexel's selection and retention of Willey as a supervisor, in violation of Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), by disciplining Willey for working for Drexel and using his master electrician's certificate to secure electrical work permits for Drexel (Pet. App.

29a-31a, 37a-42a).[1] In so finding, the Board rejected petitioner's argument that Willey himself became an employer, rather than a supervisor, by using his master's certificate to obtain electrical work permits for Drexel, and that its discipline of him therefore did not restrain or coerce Drexel's selection or retention of a supervisor (Pet. App. 31a).

The Board's order directed petitioner to cease and desist from the unfair labor practices found; to expunge all record of the disciplinary action taken against Willey; to rescind the fines; reinstate Willey as a member in good standing of IBEW; and to post appropriate notices (Pet. App. 33a-36a, 38a).

3. The court of appeals affirmed the Board's findings and enforced its order (Pet. App. 1a-14a). It concluded that "because [Willey] was fined for his affiliation with a nonunion company, 'compliance * * * with [petitioner's] demands would have "the effect of depriving [Drexel] of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances"'" and that "[s]uch a potential adverse effect on the employer's choice is determinative" under Section 8(b)(1)(B) (Pet. App. 8a).[2] The court rejected petitioner's contention that its discipline of Willey was lawful because petitioner neither represented Drexel's employees nor showed any intent to do

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[1] The Board noted that Drexel needed an electrical superintendent who had a master electrician's certificate and would use his certificate on Drexel's behalf (Pet. App. 38a). It held (Chairman Fanning dissenting) that petitioner's fine of Willey for using his certificate on Drexel's behalf amounted to "an attempt to influence Drexel's selection of Willey as its electrical superintendent every bit as much as [its] flat attempt to prohibit him from working for this nonunion employer" and was "part and parcel of the same violation" (*ibid.*).

[2] The court noted (Pet. App. 8a) that uncontroverted evidence supported the Board's finding that Willey had "extensive grievance adjustment responsibilities in his capacity as Drexel's electrical superintendent."

so (Pet. App. 8a-12a). It held that such a restrictive interpretation of Section 8(b)(1)(B) is unwarranted (Pet. App. 11a), noting that, in any event, testimony at the hearing suggested that petitioner "may indeed have had an interest in representing Drexel's employees" (Pet. App. 10a n.7). The court also rejected petitioner's contention that Willey's use of his master's certificate to secure electrical work permits for Drexel made Willey himself an employer, rather than a supervisor, and thus made Section 8(b)(1)(B) inapplicable (Pet. App. 12a-14a). Because Willey had no financial ownership interest in Drexel, the court affirmed the Board's finding that Willey's securing of electrical work permits did not make him an employer; Willey, as a supervisor, was merely acting as a managerial agent for Drexel (Pet. App. 13a).

ARGUMENT

The decision of the court of appeals is clearly correct. It accords with the controlling decision of this Court interpreting Section 8(b)(1)(B) and does not conflict with the decisions of any other court of appeals. Review is thus unwarranted.

1. Section 8(b)(1)(B) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Willey was employed as a supervisor for Drexel, with extensive grievance adjustment responsibilities. The Board reasonably concluded that petitioner's fines and expulsion of Willey for serving in that capacity for Drexel, and securing needed electrical permits on Drexel's behalf, constituted restraint and coercion of Drexel in the selection and retention of Willey as its representative for the adjustment of grievances.

2. The Board's decision is consistent with this Court's decision in *American Broadcasting Compa-*

nies, Inc. v. *Writers Guild, Inc.*, 437 U.S. 411 (1978) ("*ABC*"). In that case, the Court held that Section 8(b)(1)(B) prohibits union discipline of supervisor-members that "may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks" (437 U.S. at 430). The Court stated that union pressure which could cause supervisors to be unwilling to perform their jobs had an unlawful adverse effect because it deprived the employer of his right to choose those supervisors as his grievance-handling or collective-bargaining representatives (*id.* at 432, 436). To illustrate the unlawful effect, the Court cited with approval *New Mexico District Council (A.S. Horner, Inc.)*, 177 N.L.R.B. 500 (1969), enforced, 454 F.2d 1116 (10th Cir.1972), in which the union disciplined a supervisor-member because he worked for a nonunion employer (437 U.S. at 436 n.36). It stated, "a fine imposed in these circumstances violated the section because compliance by the supervisor with the union's demands would have required his leaving his job and thus have 'the effect of depriving the Company of the services of its selected representative for the purposes of collective-bargaining or the adjustment of grievances.'" *Ibid.*, quoting *A.S. Horner, supra*, 177 N.L.R.B. at 502.[3] The situation here is virtually identical to that in *A.S. Horner*.

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[3] Petitioner's contention (Pet. 7-8) that the court of appeals held unlawful all discipline having "any effect" on supervisors who adjust grievances or engage in collective bargaining is inaccurate. The court quite clearly focused upon whether petitioner's discipline of Willey could have the effect of depriving Drexel of his services altogether (Pet. App. 6a-8a), and concluded that "[s]uch a potential adverse effect on the employer's choice is determinative under the Supreme Court's test" (Pet. App. 8a).

In *ABC*, this Court also rejected an argument analogous to petitioner's contention (Pet. 6-8) that employers should be protected by Section 8(b)(1)(B) only if their employees are represented by the disciplining union, or if the union has shown an interest in representing the employees. In that case the union (which represented writers in the film industry) disciplined directors, as well as other supervisor-members, for working during a writers' strike. The directors neither supervised writers nor adjusted their grievances, and the union argued that this lack of a nexus exempted its discipline of the directors from the reach of Section 8(b)(1)(B). This Court rejected the union's contention. It noted that the directors adjusted other employees' grievances, and held that a "union may no more interfere with the employer's choice of a grievance representative with respect to employees represented by other unions than with respect to those employees whom it itself represents." *ABC*, *supra*, 437 U.S. at 437-438 n.37. The scope of Section 8(b)(1)(B) does not hinge on the disciplining union's representational interest or its motivation, but rather on whether its pressure "may adversely affect" the supervisor's performance of protected duties." 437 U.S. at 429.[4]

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[4] There is no merit to petitioner's contention (Pet. 6-8) that the court of appeals' decision here conflicts with the Ninth Circuit's decision in *NLRB* v. *Local Union No. 73 (Chewelah Contractor's, Inc.)*, 621 F.2d 1035, 1037 (1980) (*"Chewelah"*). The Ninth Circuit in *Chewelah* found that the disciplining union lacked a representational interest in the employer's employees and therefore held that its discipline of the employer's supervisor for working nonunion did not violate Section 8(b)(1)(B) (621 F.2d at 1037). Here, by contrast, as the court of appeals observed (Pet. App. 10a n.7), the record suggests that petitioner "may indeed have had an interest in representing Drexel's employees." There was evidence that petitioner daily approached electrical employees and asked them to sign its working agree-

3. Nor is there merit in petitioner's effort (Pet. 8-10) to bring itself within the rationale of Board cases holding that Section 8(b)(1)(B) is not applicable to union discipline imposed on a member with a substantial financial ownership interest in the employer. In the absence of any evidence that Willey shared in Drexel's profits or had any financial interest in the company, the Board reasonably concluded that Willey was not an employer, but a supervisor-member, and that petitioner's discipline of him fell squarely within the prohibition of Section 8(b)(1)(B) (Pet. App. 31a, 12a-13a).

Petitioner's contention (Pet. 8) that Willey's use of his master's certificate to secure electrical work permits for Drexel was "an ownership function which, for § 8(b)(1)(B) purposes, made Willey the equivalent of an owner" does not present an issue warranting further review. The line drawn by the Board between a financial ownership interest in an employer and the mere performance of a supervisory or managerial function for the employer is a rational one (Pet. App. 13a).[5] The

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ment (Tr. 422), that the IBEW had requested recognition from Drexel (Tr. 44), and that, just before petitioner filed its second set of charges against Willey, he had refused its business manager's request that he sign its working agreement (Tr. 403-405). Moreover, as the court below correctly concluded (Pet. App. 9a-11a), the Ninth Circuit's analysis in *Chewelah* is inconsistent with this Court's decision in *ABC* (see 621 F.2d at 1036-1037). Finally, in response to the Board's petition for rehearing, the Ninth Circuit, on December 8, 1980, added the following qualification to its opinion in *Chewelah*: "The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw [prohibiting members from working for nonunion employers] was to interfere with the employer's selection [of his bargaining representative]." A copy of the amended opinion and of the order providing for the amendment are reprinted at App., *infra*, 1a-5a.

[5] As the court of appeals noted (Pet. App. 12a-13a), in discussing the rationale for the Board's view that union discipline of a member with a substantial financial ownership interest in the employer is not covered by the section, "application of sec-

holding that Willey's securing of electrical permits for Drexel was consistent with supervisory rather than ownership status is clearly correct and, in any event, involves no more than the application of settled principles to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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tion 8(b)(1)(B) in that situation would, through the subterfuge of protecting the employer's selection of his representative, effectively deprive the union of all economic weapons, merely because the employer assumes the additional role of a supervisor." See *Glaziers and Glassworkers Local 1621*, 221 N.L.R.B. 509, 512-513 (1975); *Local 146, Sheet Metal Workers*, 203 N.L.R.B. 1090, 1093-1094 (1973). In addition, as the court further noted, "When a person has a financial self-interest in the enterprise, 'it is difficult to envision circumstances where the employer would be greatly influenced in the performance of his grievance-adjustment or collective-bargaining functions where any decision he makes in those respects directly works to his benefit or detriment depending on how he decides it'" (Pet. App. 12a, quoting *Glaziers and Glassworkers Local 1621, supra*, 221 N.L.R.B. at 512).

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-3111
Filed Dec. 8, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 73, AFL-CIO, RESPONDENT.

Before: MERRILL and FARRIS, Circuit Judges, and BONSAL,* District Judge.

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc and Judges Merrill and Bonsal would so recommend.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The opinion filed on June 25, 1980 is hereby amended per the attached copy.

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*Honorable Dudley B. Bonsal, United States Senior District Judge for the Southern District of New York, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-3111
Filed Dec. 6, 1980
AO June 25, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 73, AFL-CIO, RESPONDENT.

Before: MERRILL and FARRIS, Circuit Judges, and BONSAL,* District Judge

AMENDED OPINION

Petition for Enforcement of an Order of the National Labor Relations Board

FARRIS, Circuit Judge:

The National Labor Relations Board petitions for enforcement of its order holding the International Brotherhood of Electrical Workers, Local No. 73, in violation of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B). IBEW disciplined one of its members for violating a union bylaw that prohibited union members from working for nonunion employers. Because the union member who was disciplined was the grievance arbiter for Chewelah Contractors, Inc., the Board held that IBEW's action violated Section 8(b)(1)(B) even though IBEW did not represent Chewelah's employees. We deny enforcement of the order.

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*Honorable Dudley B. Bonsal, United States Senior District Judge for the Southern District of New York, sitting by designation.

Prior to May, 1976, William Anderson was an employee of Electric Smith, Inc. and was a member of IBEW, the bargaining representative of Electric Smith's employees. Robert LeCount was the corporate vice-president of Electric Smith. In February, 1976, Anderson and LeCount formed Chewelah Contractors, Inc. Both Anderson and LeCount made substantial unsecured loans to Chewelah. In May, 1976, Anderson terminated his employment with Electric Smith and began working for Chewelah as a vice-president. Therefore, he became a member of Chewelah's board of directors. His responsibilities, according to LeCount, President of Chewelah, included serving as Chewelah's grievance arbiter.

Anderson remained a member of IBEW even though the union did not represent Chewelah's employees. IBEW charged Anderson with violating its bylaw prohibiting members from obtaining employment with nonunion employers. The union fined Anderson $1,250 and placed him on probation for one year. On October 7, 1976, Anderson filed a charge against IBEW with the NLRB, and the Board's General Counsel issued a complaint alleging that IBEW had violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B), by restraining or coercing Chewelah in the selection of its representative for collective bargaining or the adjustment of grievances. On May 6, 1977, an administrative law judge issued a decision finding a violation as alleged. The NLRB approved the decision and ordered IBEW to cease and desist from further violations, to rescind the fines it had imposed upon Anderson, and to post an appropriate notice. 231 N.L.R.B. 134.

Section 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization ... to restrain or coerce ... an employer in the selection of his representatives for the purposes of collective bargaining or the

adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). Section 8(b)(1)(B) was intended to prohibit a union from dictating "who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling girevances." S. Rep. No. 105, 80th Cong., 1st Sess. pt. 1, p. 21 (1947). The major concern of Congress was to prevent unions from forcing employers into or out of multiemployer bargaining units. *Florida Power & Light Co.* v. *International Brotherhood of Elec. Workers*, 417 U.S. 790, 803 (1974). Section 8(b)(1)(B) was also intended to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. *See Wisconsin Electric Power Co.*, 192 N.L.R.B. 77, at 78 (1971). There is a basis for these concerns when the union charged with influencing an employer's choice of bargaining representatives is the bargaining representative of that employer's employees.

Union activity which Section 8(b)(1)(B) has been found to prohibit includes 1) picketing a company in an attempt to force the employer to dismiss a labor relations consultant thought to be "anti-union," *Helen Rose Co.*, 127 N.L.R.B. 1543 (1960), 2) attempting to force employers to join or resign from multiemployer bargaining associations, *United Slate Tile & Composition Roofers, Local 36*, 172 N.L.R.B. 2248 (1968), 3) attempting to force employers to select foremen from the ranks of union members, *Graphic Arts League*, 87 N.L.R.B. 1215 (1949), 4) expelling a union-member foreman from the union for assigning bargaining unit work in violation of a collective-bargaining agreement, *Northwest Publishers, Inc.*, 172 N.L.R.B. 2173 (1968), 5) penalizing union members for performing their nonunion supervisory duties during a strike, and forbidding them from resigning from the union to avoid further threats, *American Broadcasting Cos.* v. *Writer's Guild*

of America, West, Inc., 437 U.S. 411, 431-37 (1978). In every decision that has come to our attention, the union charged with violating Section 8(b)(1)(B) represented or demonstrated an intent to represent the complaining company's employees. Here, IBEW neither represents Chewelah's employees nor has it demonstrated a desire to represent the employees. The union had no incentive to either influence Chewelah's choice of bargaining representatives or affect Anderson's loyalty to Chewelah. Further, the acts complained of did not deprive Chewelah of a loyal bargaining representative. Their purpose was to enforce a presumably valid bylaw which one of its members had violated.

The union's action was also not inherently destructive of Chewelah's right to choose a loyal bargaining representative. The representative Chewelah chose was a member of a union which prohibited its members from working for nonunion employers. The Board does not question the validity of this bylaw. Anderson could have avoided the penalty for violating his union's bylaw by resigning from the union before he started work for Chewelah.

The union does not violate Section 8(b)(1)(B) by disciplining one of its members for working for a nonunion employer in violation of union bylaw, even though that member is also the bargaining representative of his employer, if the union neither represents nor has demonstrated an intent to represent the employer's employees. The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection.

Enforcement of the Board's order is denied.